

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

CASTONGUAY V. NEBRASKA DEPT. OF CORR. SERVS.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

PAUL CASTONGUAY, APPELLANT,  
V.  
NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

Filed March 20, 2012. No. A-11-1071.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Appeal dismissed.

Paul Castonguay, pro se

No appearance for appellees.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

PIRTLE, Judge.

**INTRODUCTION**

Paul Castonguay appeals from an order of the district court for Lancaster County that denied his motion for appointment of counsel. Castonguay had asked the court to appoint counsel to represent him in his appeal from the district court's dismissal of his habeas corpus action. We dismiss the appeal because the district court's order denying his motion for appointment of counsel is not a final, appealable order, and therefore, this court lacks jurisdiction over this appeal.

**BACKGROUND**

Castonguay filed a petition for writ of habeas corpus, which the district court dismissed. Castonguay timely appealed from the order dismissing his habeas corpus action. Castonguay also filed a motion for the appointment of counsel. The district court entered an order denying Castonguay's motion for counsel, noting that Castonguay was not entitled as a matter of right to

counsel in a habeas corpus action. Castonguay filed the instant appeal challenging the denial of the appointment of counsel.

Subsequently, on January 12, 2012, this court, in case No. A-11-849, summarily affirmed the district court's dismissal of Castonguay's habeas corpus action pursuant to Neb. Ct. R. App. P. § 2-107(B)(2) (rev. 2008).

#### ASSIGNMENT OF ERROR

Castonguay assigns that the trial court erred in denying his motion for appointment of counsel.

#### STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court. *Crawford v. Crawford*, 18 Neb. App. 890, 794 N.W.2d 198 (2011).

#### ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *Id.*

All three types of final orders require that a substantial right be affected, so we first consider whether the order denying Castonguay's motion for appointment of counsel affects a substantial right. A substantial right is an essential legal right, not a mere technical right. *Id.* A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* If an order significantly impinges on a constitutional right, for example, parents' liberty interests in raising their children or a criminal defendant's right not to be subjected to double jeopardy, this affects a substantial right. *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

The order denying Castonguay the appointment of counsel on appeal does not affect the subject matter of the litigation or significantly impinge on a constitutional right. Further, we have found no cases holding that there is a substantial right of a defendant to appointed counsel in an appeal from the dismissal of a habeas corpus action. We conclude that the district court's order denying the appointment of counsel on appeal to this court does not affect a substantial right. Accordingly, it is not a final, appealable order.

## CONCLUSION

The district court's order denying Castonguay's motion for appointment of counsel is not a final, appealable order. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *In re Interest of Marcella B. & Juan S., supra*. We, therefore, dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.